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Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-001494-ME

J.E.S. APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 06-D-500459

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
S.N.S., AN INFANT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

KELLER, JUDGE: J.E.S. appeals from the Jefferson Family Court's termination of her parental rights to her infant daughter, S.N.S. On appeal, J.E.S. argues that there was not sufficient evidence to support the family court's determination that S.N.S. was abused or neglected and that the family court erred when it permitted a social worker to express medical opinions during her testimony. For the reasons set forth below, we affirm.

FACTS

S.N.S. was born on June 23, 2005. The Cabinet for Health and Family Services (the Cabinet) had previously removed J.E.S.'s three older children and permanently placed those children with relatives. Because of concern for S.N.S.'s safety, the Cabinet sought and obtained an emergency custody order on June 24, 2005. Pursuant to that order, S.N.S. was placed in a foster home.

On April 21, 2006, J.E.S. entered into a stipulation that S.N.S. was dependent and that, due to S.N.S.'s medical needs and J.E.S.'s limitations, she could not care for S.N.S. through no fault of her own. Based on this dependency stipulation, the family court committed S.N.S. to the Cabinet on June 20, 2006. The family court also ordered J.E.S. to cooperate with the Cabinet, to undergo a psychological evaluation, to attend a CATS assessment, to follow all recommendations from that assessment, and to obtain stable housing. Furthermore, the family court ordered the Cabinet to arrange for unsupervised visitation between J.E.S. and S.N.S. with those visits to be monitored by the Cabinet at its discretion.

On November 22, 2006, the Cabinet filed a petition to involuntarily terminate J.E.S.'s parental rights and the rights of S.N.S.'s putative father, J.R.A. The family court held a hearing on that petition on April 12, 2007. Following that hearing, the family court found that S.N.S. was an abused or neglected child and that it was in the best interest of S.N.S. to terminate the parental rights of J.E.S. and J.R.A. The family court entered a consistent judgment and it is from that opinion and judgment that J.E.S. now appeals.

We note that J.R.A. did not make an appearance before the family court and has not appealed the family court's judgment terminating his parental rights. Although evidence regarding J.R.A. was presented at the termination hearing, we will not summarize it herein. Because the arguments J.E.S. makes on appeal are fact intensive, we will summarize the testimony of the witnesses at the termination hearing in as much detail as necessary below.

A. Testimony of Paula Watkins

Paula Watkins (Watkins) has been S.N.S.'s foster mother since S.N.S.'s birth. S.N.S. has various health and developmental problems and underwent treatment for kidney reflux. At the time of the hearing, S.N.S. was undergoing injection therapy for her allergies, speech therapy for her language deficits, and physical and occupational therapy to help her improve her gait and control a problem she has with shaking. Watkins noted that she advised J.E.S. when she would be taking S.N.S. for treatment, but J.E.S. attended very few of the appointments.

For a period of time, J.E.S. lived with her step-sister and took S.N.S. for overnight visits. However, from April 1, 2006, through December of 2006, J.E.S. did not have any overnight visitation with S.N.S. In fact, J.E.S. only saw S.N.S. on two occasions during that time period, on the day of the CATS testing and on S.N.S.'s birthday. Although Ms. Watkins testified that she had opened her home to J.E.S. to visit S.N.S. at any time, J.E.S. did not call Ms. Watkins to ask about S.N.S. or attempt to schedule a visit during that time period.

B. Testimony of Sandra Braunstein

Sandra Braunstein (Braunstein) is a recently retired social services clinician who worked with J.E.S. through the Cabinet from July of 2005 through December of 2005 and again from late August or early September of 2006 until February of 2007. Ms. Braunstein testified that, from December of 2005 until the late summer of 2006, J.E.S. lived in Hardin County and worked with another social worker.

By way of history, Ms. Braunstein noted that J.E.S. had been a victim of abuse as a child and had a history with the Cabinet predating S.N.S.'s birth. In 2003, because of issues related to neglect, the Cabinet removed three children from J.E.S.'s care and placed them with relatives of their father. According to Ms. Braunstein, all of the children had significant problems with lice, one of the children had "life threatening" dental problems, and two of the children had been sexually abused. As previously noted, because of J.E.S.'s inability to care for these children, the Cabinet removed S.N.S. from her care shortly after S.N.S.'s birth.

Throughout the time the Cabinet has worked with J.E.S. the major goals for J.E.S. have been for her to obtain stable housing; for her to develop parenting skills that would permit her to care for S.N.S. without assistance; and for her to get counseling to deal with self-esteem and relationship issues. Braunstein testified that the Cabinet arranged for counseling for J.E.S., and arranged for her to attend "baby school" to learn parenting skills, but did not help J.E.S. find housing. Although J.E.S. successfully completed "baby school", Braunstein did not believe that J.E.S. would ever be able to successfully parent S.N.S. without significant and ongoing assistance because of J.E.S.'s limited mental abilities.

Finally, Braunstein testified that J.E.S. had no contact with anyone in the Cabinet from August 2006 to November 2006, a period of at least 90 days. However, since moving back to Jefferson County in late November of 2006, J.E.S. has stayed in contact with the Cabinet and regularly visited with S.N.S.

C. Testimony of Allison Miller

Allison Miller (Miller) is the social worker currently assigned to J.E.S., having worked with J.E.S. for approximately three weeks prior to the hearing. Miller testified that J.E.S. had attended all of her supervised visits with S.N.S., had regularly attended counseling since January of 2007, and had cooperated with her. However, Miller stated that she did not believe that it was reasonably likely that S.N.S. could ever be returned to J.E.S. Furthermore, Miller stated that, based on J.E.S.'s abilities, she did not know of any programs that the Cabinet could offer that would increase the likelihood of S.N.S. being returned to J.E.S.

D. Testimony of Connie Nalley

Connie Nalley (Nalley), J.E.S.'s step-sister, testified that she and J.E.S. lived together in Hardin County from late August or early September of 2005 until April of 2006. Nalley has not had any significant contact with J.E.S. since April of 2006. During the time the women lived together, J.E.S. paid the rent and Nalley paid the other expenses. Because J.E.S. did not have a car and they lived eight miles from the nearest bus stop, Nalley provided transportation for J.E.S.

J.E.S. had overnight visitation with S.N.S. while she lived with Nalley. During that time, Nalley observed J.E.S. with S.N.S. and, initially, Nalley expressed some concerns to Braunstein about J.E.S.'s ability to care for S.N.S. without assistance.

In particular, Nalley had concerns about J.E.S.'s mental ability to remember appointments for S.N.S. and to remember to give S.N.S. her medication. However, after observing J.E.S. over time, Nalley's concerns diminished, and she concluded that J.E.S. probably could care for S.N.S. without supervision.

E. Testimony of J.E.S.

J.E.S. is 30 years old and has an 11th grade education. She has never worked, but receives SSI because of tremors in her hands, allergies, and asthma. J.E.S. testified that she wants to try to get her G.E.D. but has not been able to find out where to go to do so. J.E.S. was removed from her mother's home and moved to Jefferson County to live with her grandparents when she was eight or nine. J.E.S. testified that she had been sexually abused as a baby and by her grandfather as a preadolescent.

S.N.S. was removed from J.E.S.'s care shortly after her birth, and S.N.S. has been in foster care since that time. After S.N.S. was removed from her care, the Cabinet set out a plan so that J.E.S. and S.N.S. might be able to reunite. That plan included undergoing counseling, attending parenting classes, and finding stable housing. J.E.S. testified that she began counseling with Lovey Edwards (Edwards). That counseling stopped when Edwards went on vacation and did not contact J.E.S. to schedule appointments upon her return. In December of 2006, J.E.S. resumed counseling with a different counselor and, as of the date of the hearing, continued to receive that counseling.

As to parenting classes, J.E.S. attended "baby school" and learned what to do if S.N.S. should get sick and how to keep S.N.S. safe. J.E.S. testified that, although

she has never been alone with S.N.S., she believes that she could care for S.N.S. without supervision.

As to her housing situation, J.E.S. testified that she has lived in five different domiciles since S.N.S.'s birth. Although she has very limited economic resources, SSI plus food stamps totaling approximately $700 per month, the Cabinet did not offer J.E.S. any assistance with finding affordable and suitable housing.

On cross-examination, J.E.S. testified that she lived with a man named Terry after moving from Nalley's house. When Braunstein asked J.E.S. about Terry, J.E.S. refused to disclose any information about him. J.E.S. stated that she did not answer Braunstein's questions about Terry because she did not have any visitation with S.N.S. Therefore, S.N.S. would not be exposed to Terry.

When asked about the time period from August to November when the Cabinet's records show no contact, J.E.S. said that she spoke with her Hardin County social worker and was told that her case was being transferred from Hardin County to Jefferson County and that there was some dispute regarding whether Jefferson County would take the case. J.E.S. did not actually meet with anyone from the Cabinet again until she received documents indicating that a termination of parental rights action had been filed.

STANDARD OF REVIEW

The trial court has broad discretion in determining whether a child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, 552 S.W.2d 672 (Ky.App. 1977). The standard of review in termination of parental rights cases is set forth in

M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116-17 (Ky.App. 1998), as follows:

> The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, Ky.App., 552 S.W.2d 672, 675 (1977). This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources*, Ky.App., 706 S.W.2d 420, 424 (1986).
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> 'Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.' *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

As to the admission of Braunstein's testimony regarding J.E.S.'s ability to care for S.N.S., the standard of review is whether the trial court abused its discretion. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Brewer v. Commonwealth,* 206 S.W.3d 313, 320 (Ky. 2006). With these standards in mind, we will address the issues raised by J.E.S.

ANALYSIS

As noted above, J.E.S. raises two issues on appeal: (1) whether the family court erred in permitting Braunstein to express medical opinions when she was not qualified to do so; and (2) whether the evidence was sufficient to support the family

court's findings of fact and conclusions of law. We will address those issues in that order.

It appears from her brief that J.E.S.'s primary objection to Braunstein's testimony revolves around KRS 625.090(3), which provides that mental illness or mental retardation may be factors in determining whether to terminate parental rights. However, to be considered, these factors must be certified by a "qualified mental health professional."

At the outset, we note that Braunstein did not offer an opinion that J.E.S. was mentally retarded or that she suffered from a mental illness. She simply testified that J.E.S.'s apparent intellectual deficiencies would make it difficult, if not impossible, for J.E.S. to parent S.N.S. without ongoing assistance. Furthermore, we note that the family court did not make a finding that J.E.S. was mentally retarded or that she suffered from a mental illness. The family court did find that J.E.S. had "mental health limitations." However, that finding falls short of a finding of mental illness or mental retardation. Therefore, since Braunstein offered no medical opinions and the family court made no findings of a medical condition, J.E.S's reliance on KRS 625.090(3) to attack Braunstein's testimony is misplaced.

We note that J.E.S. cites *Hellstrom v. Commonwealth*, 825 S.W.2d 612 (Ky. 1992), for the proposition that a social worker cannot offer an expert opinion regarding a person's "psychological disorder or other abnormal mental condition." *Id.* at 614. However, *Hellstrom* is distinguishable. In *Hellstrom* the social worker made a diagnosis of an alleged abuse victim's condition based, in large part, on what the alleged victim told him. The Supreme Court of Kentucky found this testimony objectionable

because the social worker based his opinion on what the alleged victim said, not on his own observations of the alleged victim. As the Supreme Court noted, the social worker was not trained to determine if what the alleged victim was saying was truthful or not.

In this case, Braunstein did not make any type of diagnosis and she did not base her opinion on what J.E.S. told her. She simply testified that, based on her years of experience in this field and her observations of J.E.S., J.E.S.'s obvious limitations would make it difficult for J.E.S. to effectively care for S.N.S. Furthermore, Braunstein's opinion is supported by the report from the CATS evaluation that the court admitted into evidence, and which states:

> [J.E.S.] appears to rely heavily on others to assist her in meeting case plan requirements . . . and it has been reported by multiple sources that [J.E.S.] requires significant assistance caring for [S.N.S.] even for short periods of time. Without reliable support, [J.E.S.] appears to have difficulty maintaining her progress or completing her case plan requirements.
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> . . .
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> Unfortunately, the interaction between [J.E.S.]'s impaired mental health functioning, her history of childhood maltreatment, and her cognitive deficits seems to limit her ability to gain insight and demonstrate improved judgment in her role as a parent to [S.N.S.] (i.e., as documented by her current decision to forego visitations with [S.N.S.] and her functioning as a caregiver in general despite approximately 2 years of mental health intervention).
>
> . . .
>
> [J.E.S.]'s motivation to regain custody of [S.N.S.] and her ability to meet [S.N.S.]'s most basic care needs (i.e., stable housing, needs for nurturance, hygienic grooming, etc [.]) are highly questionable. Of additional concern is [J.E.S.]'s limited response to intervention. [J.E.S.] has received approximately two years of therapeutic services yet continues to make decisions that that [sic] impede her progress toward

> reunification with her daughter. The CATS team has determined that returning [S.N.S.] to [J.E.S.] at this time would pose an unacceptable level of risk to [S.N.S.]'s safety and well being as there appears to be a poor fit between [S.N.S.]'s extensive caregiving needs . . . and [J.E.S.]'s limited abilities. Currently, the main priority is for [S.N.S.] to achieve permanency in a stable, loving home and [J.E.S.]'s ability to provide such a home for [S.N.S.] continues to be doubtful despite 13 months of interventions, which suggests a poor prognosis for the successful reunification of this family.

Because Braunstein's testimony was supported by expert evidence in the record as well as her own observations, we hold that it was admissible. Therefore, we discern no error in the family court's admission of Braunstein's testimony. Furthermore, even if Braunstein's testimony was not admissible, the family court's findings were more than adequately supported by the CATS evaluation. Therefore, any error by the family court in admitting Braunstein's testimony was not reversible error.

The second issue raised by J.E.S. is that the family court's finding that S.N.S. was abused or neglected was not supported by sufficient evidence and that there was not sufficient evidence to terminate her parental rights. KRS 625.090 sets forth the format the family court must follow when deciding to involuntarily terminate parental rights. Pursuant to KRS 625.090(1)(a), the family court must find that the child had been "adjudged to be an abused or neglected child" or the family court must make that finding. KRS 600.020(1) sets forth what constitutes an abused or neglected child. Once a finding of abuse or neglect has been made, the family court must then determine whether any of the grounds set forth in KRS 625.090(2) have been established by clear and convincing evidence. We note that there is some overlap between the definitions in KRS 600.020(1) and the grounds in KRS 625.090(2), in particular with regard to failure to provide care, food, clothing, shelter, etc. Thus a finding that a child meets the definition of abused or

neglected under KRS 600.020(1) could also meet the same finding required by KRS 625.090(2).

The family court found that J.E.S. "ha[s] continuously or repeatedly failed to provide or [was] incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for [S.N.S.]'s well-being . . . ." These findings are what is required under KRS 600.020(1) in order to make a determination of neglect and are supported by the testimony of Braunstein and Watkins that J.E.S. made little, if any, effort to see S.N.S. between April and November of 2006, that J.E.S. has not contributed to S.N.S.'s support, and that J.E.S. has shown little, if any, interest in S.N.S.'s medical treatment. We recognize that J.E.S. may have been confused about the Cabinet's involvement in her case when it was being transferred from Hardin County to Jefferson County. Despite this, Watkins testified that her house was open to J.E.S. for visitation whenever J.E.S. wanted, and that J.E.S. had her telephone number. However, J.E.S. did not call Watkins between April and November of 2006 and only saw S.N.S. twice during that time period. Therefore, the family court's findings of neglect are supported by substantial evidence.

Having determined that S.N.S. was a neglected child, the family court then determined that termination of J.E.S.'s parental rights was in the best interest of S.N.S. In doing so, the family court found that J.E.S. had "failed to visit or otherwise contact the child for a period or periods of not less than ninety (90) days in duration." KRS 625.090(2)(a). Again, this finding is supported by the testimony of Watkins and Braunstein that J.E.S. only saw S.N.S. twice between April and November of 2006. Therefore, we discern no error in the family court's findings.

As noted above, in making its determination that S.N.S. was neglected, the family court found that J.E.S. had failed to provide essential parental care for S.N.S. Additionally, the family court found that J.E.S. had done so for a period of not less than six (6) months and that "there is no reasonable expectation of significant improvement in parental conduct in the immediately foreseeable future considering the age of [S.N.S.]." KRS 625.020(2)(e). Again, this finding is supported by the testimony of Watkins and Braunstein that J.E.S. failed to make any significant attempts to contact S.N.S. from April of 2006 to November of 2006. Furthermore, the CATS report, as set forth above, in conjunction with Braunstein's testimony, supports the family court's finding that it is not likely that J.E.S.'s parenting skills will improve.

Finally, we note that there was no dispute that S.N.S. had been "in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights." KRS 625.090(2)(j). That fact, in and of itself, after a finding of neglect, is sufficient to support the family court's decision to terminate J.E.S.'s parental rights. Therefore, we hold that the family court's decision is supported by substantial evidence and is not clearly erroneous.

CONCLUSION

Having reviewed the record, we hold that the family court did not abuse its discretion in permitting Braunstein to testify regarding J.E.S.'s fitness to parent. Furthermore, the family court did not abuse its discretion in finding that S.N.S. was neglected and that it would be in her best interest to terminate J.E.S.'s parental rights as

those findings were supported by clear and convincing evidence in the record. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Yesowitch
Louisville, Kentucky

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES:

G. Thomas Mercer
Louisville, Kentucky